

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
April 29, 2008 Session

**MITCHELL WALDROOP v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Campbell County  
No. 11170 E. Shayne Sexton, Judge**

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**No. E2006-02368-CCA-R3-PC - Filed October 2, 2008**

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The petitioner, Mitchell Waldroop, was denied post-conviction relief by the Criminal Court for Campbell County from his convictions for two counts of especially aggravated kidnapping and resulting concurrent thirty-six-year sentences in the Department of Correction. He appeals and contends that (1) he is entitled to post-conviction relief because the state failed to file a responsive pleading to his pro se petition in the form required by the Post-Conviction Procedure Act; (2) he was deprived of his due process right to present his post-conviction claim at a meaningful time and in a meaningful manner; (3) he was denied the effective assistance of counsel in the conviction proceedings; (4) he was sentenced in violation of the Sixth Amendment; and (5) he was deprived in the conviction proceedings of a hearing pursuant to Momon v. State, 18 S.W.3d 152 (Tenn. 1999), addressing his understanding of his right to testify. We affirm the trial court's judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and ALAN E. GLENN, JJ., joined.

Gerald L. Gulley, Jr., Knoxville, Tennessee (on appeal) and Robert William Scott, Jacksboro, Tennessee (at trial), for the appellant, Mitchell Waldroop.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; William Paul Phillips, District Attorney General; and Michael O. Ripley, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The defendant's convictions relate to his kidnapping his ex-wife and daughter. This court summarized the trial evidence in the opinion on direct appeal:

The defendant's ex-wife, Jamie Waldroop Hatfield, testified that she and the defendant were divorced in 1996 but had been trying to reconcile in August of 1997. They have a daughter, Brittany, who

was six years old at the time of the offenses. Ms. Hatfield had custody of Brittany, and they had been living with Ms. Hatfield's mother for a week when the offenses occurred. Ms. Hatfield testified that on August 2, 1997, the defendant called at 10:00 p.m. requesting to visit Brittany. She said she first told him that it was too late, but she eventually agreed to let him have a brief visit. The defendant arrived at 11:00 p.m. accompanied by a friend, J.B. Sharp. At one point, the defendant asked Ms. Hatfield to call her friend, Crystal, to see if she would go out with Mr. Sharp. Ms. Hatfield said that she called Crystal but that Crystal said she was not interested. Ms. Hatfield said that when she told Crystal, "I don't blame you," the defendant became angry, grabbed the phone, and slammed it down. She said that the defendant then grabbed her neck and began choking her. The defendant told Mr. Sharp to leave, and he did.

Ms. Hatfield testified that the defendant told her that she was going home with him. She said that when she told him she did not want to go, the defendant told her that it did not matter, pulled her off the couch, and put a gun to her back. She said that she caught a glimpse of the gun as the defendant raised it to her back. She said the defendant told her that they were going for a ride and that if she did not go with him, he would "finish it there." Ms. Hatfield said that she, the defendant, and Brittany got into her car and that the defendant drove through LaFollette. She said that the defendant continuously questioned her about who she was dating, accused her of lying, and repeatedly slapped her in the face. She said that he drove to a road where people dump their garbage and continued to question her. She said he told her that he had planned to bring her to the area to finish what he had started. She said that when she began telling the defendant that she loved him and wanted to work things out, the defendant calmed down and drove them to his trailer. She said that at the trailer, the defendant took the gun from behind his back and handed it to her, telling her to shoot him. She said she put away the gun, a .44 caliber Bulldog. She testified that she and Brittany stayed at the trailer for several days until she was able to find a place to go where the defendant would not find her. Ms. Hatfield admitted that during the time she stayed with the defendant at his trailer, she continued to go to work and did not call the police.

Charity Queener testified that she worked with Ms. Hatfield at Arby's during early August. She testified that around August 5, she noticed that Ms. Hatfield had several large bruises around her neck, a busted lip, and a large bruise above her right eyebrow. She said that Ms. Hatfield left Arby's on August 5 to go to Nashville. She said that she spoke with Ms. Hatfield a few weeks later and invited

Ms. Hatfield and Brittany to live with her in Knoxville. She said that she and her boyfriend picked up Ms. Hatfield and Brittany in Nashville and that they lived with her for about one month. She said that when Ms. Hatfield left, she was afraid to tell her where she was going.

Leslie Browning testified that she worked at Arby's as a manager in August 1997. She said that her records show that Ms. Hatfield worked at Arby's from 11:00 p.m. on August 2 to 7:00 a.m. on August 3 and worked the same shift from August 3 to August 4.

J.B. Sharp testified that he went with the defendant to see Brittany and Ms. Hatfield. He said that before they left the defendant's trailer, the defendant put his gun on the counter and left it there. He said that they went to Sonic and then to Ms. Hatfield's mother's house. He said that the defendant and Ms. Hatfield got into an argument after Ms. Hatfield called a friend. He said that the defendant told him to leave and that he left in the defendant's truck. Mr. Sharp said that he went to the defendant's trailer the next day and returned the defendant's truck. He said that Ms. Hatfield did not tell him that the defendant had kidnapped her at gunpoint. Mr. Sharp admitted that he is afraid of the defendant.

David Stanley Underwood, Jr., testified that he was at the defendant's trailer on the night of the incident. He said that before the defendant and Mr. Sharp left to go see Ms. Hatfield, the defendant left his pistol lying on the counter.

Rebecca Waldroop, the defendant's sister-in-law, testified that Ms. Hatfield was at her house on August 2 at 3:00 p.m. She said that Ms. Hatfield told her that the defendant had beaten her. She said that Ms. Hatfield pulled her hair back to show a bruise but that no bruise existed and that she had no marks on her face and did not mention the defendant kidnapping her.

State v. Mitchell L. Waldroop, No. E1999-01187-CCA-R3-CD, Campbell County (Tenn. Crim. App. July 26, 2000), app. denied (Tenn. Mar. 12, 2001).

The petitioner filed a timely pro se petition for post-conviction relief, and counsel was appointed. The petitioner later retained counsel. The court conducted a hearing, at which the petitioner's proof focused on allegations of ineffective assistance of counsel.

The petitioner testified that he and trial counsel had communication problems from the beginning and that counsel "refused point blank" to investigate leads the petitioner provided. He said counsel met with him only three to five times on court dates and did not visit him in jail. He

said he attempted to have counsel removed but that the trial judge would not grant his request. He said he gave counsel the names of sixteen witnesses he wanted subpoenaed approximately five months before trial but that counsel subpoenaed only five of them. He said that some of these witnesses would have testified that they were around the defendant and his ex-wife regularly and that they could have discredited the defendant's ex-wife's testimony on various points, including her testimony that she had been physically abused by the defendant and that they were separated at the time of the crimes. He said his two daughters from his first marriage would have testified that his daughter Brittany, one of the victims in the present case, told them that her mother had been untruthful about the defendant having kidnapped them. He said counsel also failed to subpoena Brittany despite his request. He said counsel failed to subpoena an individual who could have impeached his ex-wife's statement to federal investigators denying an extramarital relationship with that individual. He said another witness would have testified that the victims had lived in their home after the offenses and that there was never a mention of kidnapping. He said another witness would have testified that the defendant's ex-wife made sexual advances toward the witness and that the witness could have contradicted his ex-wife's claim that the defendant was unemployed. He said that he provided witness statements taken by federal investigators to trial counsel.

The petitioner testified that he wanted several prospective jurors removed but that counsel refused. He said one juror in particular concerned him for several reasons. First, she was acquainted with a detective. Second, the juror's husband was his mother-in-law's divorce attorney, and his mother-in-law was a state's witness. Third, the law partner of the juror's husband represented the petitioner's wife<sup>1</sup> in divorce proceedings. Finally, the juror's husband had represented his mother-in-law after his mother had taken out a warrant against his mother-in-law for "storm[ing] through the door threatening to kill" him. He conceded he did not know whether the juror had any knowledge of the incident.

The petitioner testified that although he wanted to testify at trial, counsel did not permit him to do so. He said he did not understand that it was his decision, not counsel's, whether he would testify. He said he was aware his prior convictions would be introduced if he took the stand.

The petitioner testified that his ex-wife had admitted in a telephone call to him after his convictions that she had fabricated the kidnapping. He said she wrote him a letter in which she admitted having had the extramarital relationship she denied previously. He said his ex-wife had visited him several times in prison and had sent him a photograph of herself in a bikini.

The petitioner testified that trial counsel did not investigate his criminal history more thoroughly. He said that his sentence was enhanced because he had a prior conviction for kidnapping his previous wife and his daughter and that the court relied on the fact he used a gun in committing the offense, even though the fact that he used a gun was incorrect. He said he completed paperwork for the presentence report but that he was never aware of the presentence investigation completed by a probation officer.

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<sup>1</sup>The petitioner did not specify whether his "wife" referred to the victim or to the woman to whom he had been married before his marriage to the victim.

Trial counsel testified that he communicated with the petitioner in person when the petitioner was in the Campbell County Jail and by letter when the petitioner was being held elsewhere. He said the petitioner had given him names of several witnesses three or four days before trial. He said that he attempted to contact the witnesses for whom he had telephone numbers but that some of them only had information related to the petitioner's arson case. He said the petitioner wanted him to pursue a theory that the petitioner's ex-wife fabricated the kidnapping because she was having an affair and wanted to have the petitioner "out of her hair," but he believed this evidence would also have provided a motive for the petitioner to have committed the kidnappings. He said that he did not recall whether he had talked to some of the witnesses but that he "made every possible attempt to locate these witnesses and talk to them."

Trial counsel testified that he did not remember his conversation with the petitioner about whether the petitioner would testify but that in sixteen years of practice, he had never told a client he could not testify. He said that based upon the trial court's ruling about the admissibility of some of the petitioner's prior convictions, he believed it was in the petitioner's best interest not to testify.

Trial counsel testified that he did not recall whether the petitioner asked him to remove the juror whose husband was an attorney. He said he thought the woman would be a good juror because she had served on another jury that had acquitted a defendant.

Trial counsel testified that his strategy at trial had been to attack the state's timeline of events. He said he hoped to undermine the victim's credibility by proving that the crimes could not have happened when she said they did.

Jamie Hall, the petitioner's ex-wife and one of the kidnapping victims, testified that the petitioner had a gun on the night of the crimes. She first denied that she sent the petitioner a picture of herself in swimwear after his conviction. However, after the photograph and the accompanying letter were received as evidence, she admitted she had done so. She admitted she had sent the petitioner pictures of his daughters. She said she had visited the petitioner in prison and had a photograph taken with him but that she had only done so at their daughter's request. She admitted having had an extramarital "romantic relationship" before the kidnapping, notwithstanding her denial of the relationship to federal investigators.

Carolyn Taylor testified that she was the petitioner's mother. She said that she overheard a conversation between the petitioner and trial counsel in which the petitioner expressed his desire to testify but that counsel told her he did not want to put the petitioner on the stand.

After the hearing, the trial court entered a written order in which it found that the petitioner had failed to prove any basis for post-conviction relief. The court denied the petition. Because the petitioner's retained counsel had not been retained for the appeal, the petitioner proceeded pro se and filed a brief and motions contesting the accuracy of the appellate record. This court appointed

counsel who filed a supplemental brief which incorporated the issues and arguments previously stated in the petitioner's pro se brief. We will endeavor to address all issues raised.<sup>2</sup>

## I

The petitioner claims that he is entitled to relief because the state conceded the truthfulness of the allegations of his post-conviction petition by failing to file a responsive pleading to the original pro se petition. He argues that under Tennessee civil procedure, the state's answer was required to respond to each allegation and to assert any affirmative defenses. See Tenn. R. Civ. P. 8.02, 8.03, 8.04. The state argues that it filed a response which contained a general denial of the allegations, although it concedes its response was untimely.

The Post-Conviction Statute provides that "[f]ailure by the state to timely respond does not entitle the petitioner to relief . . . ." T.C.A. § 40-30-108(a). Further, the Tennessee Rules of Civil Procedure are not applicable in post-conviction proceedings except as specifically provided by Tennessee Supreme Court Rule 28. In the present case, the petitioner has not demonstrated any exception to the general rule that the Rules of Civil Procedure do not apply. The petitioner is not entitled to relief on the basis of the state's failure to file a timely and specific response to his allegations.

## II

The petitioner claims that he was deprived of his due process right to present his post-conviction claims at a meaningful time and in a meaningful manner. The petitioner's complaints may be categorized into three general areas: (1) deviations from the statutorily prescribed timeline for post-conviction claims; (2) the state's lack of a detailed response to and the trial court's failure to consider some of his pro se claims; and (3) the absence of certain evidence and testimony he desired to have presented.

A petitioner in a post-conviction proceeding is entitled to an opportunity to be heard at a meaningful time and in a meaningful manner. Stokes v. State, 146 S.W.3d 56, 61 (Tenn. 1995) (citing Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976)). In the present case, the petitioner had appointed and, later, retained counsel. A hearing was conducted on his claims, at which both he and his retained counsel were asked to state the claims presented. The specific claims enumerated generally fell within the category of ineffective assistance of counsel, and the court ruled that the petitioner had failed to establish that counsel was ineffective. The petitioner's complaints that the litigation did not proceed exactly as he desired do not amount to a due process deprivation in the face of his having been afforded an opportunity for his claims to be heard at a meaningful time and in a meaningful manner. There was no due process violation. See Stokes, 146 S.W.3d at 61.

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<sup>2</sup>The pro se issues are addressed in sections I, II, and III. The issues raised by counsel are addressed in sections IV and V.

We view some of the petitioner's allegations as complaints about the manner in which the attorney who represented him in the post-conviction proceedings in the trial court presented, or did not present, claims and evidence. However, there is no constitutional or statutory right to effective assistance of counsel in a post-conviction proceeding. See, e.g., Stokes, 146 S.W.3d at 61. The petitioner is not entitled to relief on this basis.

Further, as we noted in section I, a petitioner is not entitled to post-conviction relief based upon deviations from the statutory timeline for post-conviction proceedings. See T.C.A. § 40-30-108(a). We are not persuaded that the passage of time deprived the petitioner of the opportunity for a full and fair hearing. See Juan Alfonzo Hill v. State, No. E2004-02915-CCA-R3-PC, Washington County (Tenn. Crim. App. Sept. 19, 2005) (holding in case involving delay of over four years between filing of post-conviction petition and hearing that petitioner was not deprived of a full and fair hearing where he was "given every opportunity to present evidence and argument with respect to his claims"). We note that in the present case, the time between the first pro se filing and the hearing was the same approximate length as that in Juan Alfonzo Hill and that during that time, the petitioner engaged in many actions that complicated the proceedings, including filing numerous pro se pleadings; refusing to cooperate with appointed counsel; filing complaints against one of his attorneys, the clerk of court, and the district attorney general; and seeking recusal of a trial judge. The petitioner has not demonstrated any due process deprivation in the proceedings.

### III

Next, we consider the petitioner's claim that he was denied the effective assistance of counsel in the conviction proceedings. In so doing, we are hindered by appointed counsel's failure to address this issue in his brief, despite the fact that the post-conviction hearing focused on this issue. From the petitioner's pro se brief filed before the appointment of counsel, we glean the following complaints:

1. Trial counsel failed to strike the juror who was married to an attorney who had represented the petitioner's mother-in-law and whose partner had represented the victim in divorce proceedings;
2. As the petitioner sought to remove counsel during the conviction proceedings, the petitioner and counsel were adversaries, and trial counsel essentially did not act as counsel for the petitioner;
3. Trial counsel prevented the petitioner from testifying; and
4. The trial court failed to rule on some of the allegations of his pro se petition.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed

questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 104 S. Ct. at 2068. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); see DeCoster, 487 F.2d at 1201.

First, with respect to his allegation that counsel failed to strike the juror who was married to an attorney, the trial court found that the petitioner failed to prove that this juror had any information which prejudiced the petitioner's defense. On review of the record, we hold that evidence does not preponderate against the trial court's determination. The petitioner offered no proof, either through the juror's testimony or otherwise, that the juror had information which prevented her from properly discharging her duties.

The petitioner's second claim is that due to a breakdown in the attorney-client relationship, trial counsel left him in a position which deprived him of his Sixth Amendment right to counsel. This claim was not specifically addressed in the trial court's order denying post-conviction relief;

however, it was not raised in these terms in those proceedings. In any event, the trial court found that the petitioner had not proven that he was deprived of the effective assistance of counsel in the conviction proceedings. Further, the record reflects that the trial court considered the petitioner's request to have trial counsel removed during the conviction proceedings and that the court found the petitioner's complaints to be without merit. We hold that the petitioner has not established entitlement to relief on this basis.

Third, in considering the petitioner's claim that despite his wishes to the contrary counsel prevented him from testifying, we note that the trial court found that the evidence established otherwise. The court accredited the testimony of trial counsel that he would never tell a criminal defendant that he could not testify, thereby rejecting the petitioner's testimony that counsel told him he could not testify. The trial court also found that given the ruling on the admissibility of the petitioner's prior convictions and the petitioner's proposed testimony, the outcome of the petitioner's case would have been the same had he testified. In addition, the record of the conviction proceedings reflects the trial court ruled that if the petitioner chose to testify, the prosecution could impeach him with evidence of felony possession of firearms, making false statements in obtaining firearms, and aggravated assault. Trial counsel then stated that the petitioner would not testify because of the trial court's ruling regarding the admissibility of the prior convictions. The petitioner made a proffer of his testimony and denied having had a gun and having kidnapped his wife and child. He said that the gun was his wife's and that she used it for protection when traveling to and from her late-night job. We hold that the evidence does not preponderate against the trial court's findings. The petitioner has not demonstrated that the trial court erred in denying relief on this basis.

Finally, the petitioner claims that the trial court erred in failing to make findings of fact and conclusions of law on ineffective assistance of counsel claims made on pages 9-10 and 20 of his pro se petition and pages 1-7 of his pro se amended petition. He does not identify these claims more specifically, argue that these claims were listed by counsel or himself at the post-conviction hearing as claims upon which he was proceeding, or explain why he is entitled to relief on them. The petitioner is correct that the post-conviction statute requires the trial court to enter a final order or memorandum which states "all grounds presented" and "findings of fact and conclusions of law with regard to each ground." T.C.A. § 40-30-111(b); Tenn. Sup. Ct. R. 28, §9(A). However, even if the court did not address every allegation of the pro se filings, the petitioner is not entitled to relief in the absence of a showing of harm. *See, e.g., Michael H. Cammon v. State*, No. M2006-01823-CCA-R3-PC, Rutherford County (Tenn. Crim. App. Aug. 23, 2007); *Jerome Sawyer v. State*, No. W2005-01813-CCA-R3-PC, Shelby County (Tenn. Crim. App. Mar. 15, 2007), *app. denied* (Tenn. Aug. 13, 2007), *reh'g denied* (Tenn. Sept. 17, 2007); *Ralph Dewayne Moore v. State*, No. E2005-01007-CCA-R3-PC, Roane County (Tenn. Crim. App. Nov. 17, 2005), *app. denied* (Tenn. May 30, 2006). Because he has not identified these issues and has not explained why he was entitled to substantive relief on them, we hold that any omission from the trial court's ruling was harmless.

#### IV

The petitioner claims he was sentenced in violation of the Sixth Amendment because the trial court enhanced his sentences based upon its own determination that the petitioner has previously committed a similar armed kidnapping of family members, even though the conviction was for

simple, rather than aggravated, kidnapping. This claim is based upon the Tennessee Supreme Court's decision in State v. Gomez, 239 S.W.3d 733 (Tenn. 2007) and the rulings of the United States Supreme Court in Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004); and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000).

This claim was not raised until after the conclusion of the conviction proceedings, that is, after the petitioner's convictions had become final. Indeed, none of the cases cited above were decided until after the petitioner's convictions had become final. This court has held that the holdings of Cunningham, Blakely, and Apprendi are not to be applied retroactively. See, e.g., Billy Merle Meeks v. Ricky J. Bell, No. M2005-00626-CCA-R3-HC, Davidson County (Tenn. Crim. App. Nov. 13, 2007), app. denied (Apr. 7, 2008), pet. for cert. filed (U.S. May. 19, 2008) (No. 08-5861). This claim is not a cognizable basis for post-conviction relief.

## V

Finally, the petitioner claims he is entitled to post-conviction relief because the trial court failed to conduct a hearing pursuant to Momon v. State, 18 S.W.3d 152 (Tenn. 1999), after trial counsel prohibited the petitioner from testifying in the conviction proceedings. The petitioner's brief prepared by counsel contains no argument on this issue, consisting entirely of a statement of the issue and a lengthy quotation from Momon. We remind counsel that a brief is required to contain "[a]n argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on[.]" Tenn. R. App. P. 27(a)(7).

In any event, the petitioner is not entitled to relief. In Momon, our supreme court mandated certain procedures be employed to ensure that a defendant personally waives his right to testify but stated,

The procedures are prophylactic measures which are not themselves constitutionally required. As such, the procedures adopted herein do not establish a new constitutional rule which must be retroactively applied . . . . [M]ere failure to follow these guidelines will not in and of itself support a claim for deprivation of the constitutional right to testify if there is evidence in the record to establish that the right was otherwise personally waived by the defendant.

Momon, 18 S.W.3d at 163. Momon was decided after the petitioner's trial but while his case was pending on direct appeal, and the trial court did not follow the Momon procedure at the petitioner's trial. The trial court did not address the Momon issue as a freestanding constitutional claim outside of the petitioner's ineffective assistance of counsel claim. Nevertheless, its findings regarding the petitioner's claim that counsel prevented him from testifying are instructive. The court accredited trial counsel's testimony over that of the petitioner and his mother, and the court found that the petitioner's case would not have been affected had he testified before the jury. Trial counsel testified

at the post-conviction hearing that although he did not have a specific recollection of any conversation with the petitioner and his mother about the petitioner testifying, he would have told the petitioner that it would not be in his best interests to testify given the court's ruling on the admissibility of prior convictions but that he would not have told the petitioner he could not testify. Examination of the trial transcript from the record of the petitioner's direct appeal lends support to this testimony. Counsel stated on the record that the petitioner would not testify based upon the court's ruling. The petitioner took the stand for a proffer, and at the conclusion he was asked, "Is there anything else that you want to put on the record?" to which he responded, "I have nothing else to say." The trial court accredited counsel's testimony and discredited the petitioner's testimony. The trial court did not err in denying post-conviction relief.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE